RECORD AND BRIEFS.

Supreme Court, U.S.
FILED
DEC 9 - 2016
OFFICE OF THE CLERK

No. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Government of the United Mexican States respectfully submits this brief as *amicus curiae* in support of Petitioner. Counsel for all parties have consented in writing to its filing.[1]

The 2,000-mile-long border between Mexico and the United States is the busiest in the world, with hundreds of millions of crossings each year.[2] Each of the two nations has a legitimate concern for the policies of the other in connection with their shared border. Mexico has a vital interest in working with the United States to improve the safety and security of the border and ensure that both governments' agents act to protect, rather than endanger, the safety of members of the public in the border area.

The border runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. In recent decades, the establishment of a secured and patrolled border has meant that residents of border communities come into fre-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, U.S. Bureau of Transportation Statistics, *Border Crossing/Entry Data*, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (July 2016); White House Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011).

quent contact with officers guarding the border. In some areas, residents going about their daily business on the Mexican side of the border spend much of their day within shooting distance of armed U.S. Border Patrol agents.

Shootings at the border are, unfortunately, far from a rare occurrence. According to U.S. Customs and Border Protection's own statistics, its officers (including Border Patrol agents) have reported use of deadly force involving firearms 243 times from October 2010 through August 2016, nearly all of them at or near the U.S.-Mexico border.[3] Many of the shootings resulted in death, and a number of those killings involved shots fired across the border.

In this case, on June 7, 2010, U.S. Border Patrol agent Jesus Mesa shot and killed Sergio Adrián Hernández Güereca, a fifteen-year-old national of Mexico. At the time of the shooting, the agent was in the United States, and the boy was in Mexico. Sergio's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son.[4] The District Court and the Court of Appeals en banc held that their claim could not be heard because their son was on Mexican soil when he was killed.

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[3] *See* U.S. Customs & Border Protection, *CBP Use of Force Statistics*, https://www.cbp.gov/newsroom/stats/cbp-use-force (Sept. 26, 2016), *archived at* https://perma.cc/PD3Y-5CAH.

[4] As this case is before the Court on review of an order granting a motion to dismiss for failure to state a claim, we assume the facts alleged in the complaint to be true for present purposes.

This case raises important issues concerning the applicability of the Fourth and Fifth Amendments to the U.S. Constitution. In recognition of U.S. sovereignty, Mexico respects the authority of the United States courts to interpret their own Constitution and laws. Mexico, however, hopes and believes that this Court will find it helpful to hear Mexico's perspective on matters affecting Mexico's sovereign interests.

As a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed a U.S. national standing on U.S. soil. Yet the Fifth Circuit's decision in this case effectively means the families of those killed by U.S. Border Patrol agents may not obtain any remedy, no matter how unjustified the agents' actions, if the victims happened to be on the Mexican side of the border when the agent opened fire.

SUMMARY OF ARGUMENT

Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), there is no bright line at the border beyond which all constitutional rights cease. Rather, this Court has employed a case-by-case inquiry to determine if it would be impractical or anomalous to apply U.S. constitutional rights out-

side U.S. borders. Here, Agent Mesa was clearly on U.S. soil when he acted, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández was on. Unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), applying U.S. law in this case would not interfere with operations of the Mexican government within Mexico. On the contrary, providing an adequate and effective remedy would show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals.

The decision below also failed to take due account of the binding international human rights obligations that the United States has voluntarily undertaken to Mexico and its nationals. Those include, among other things, the fundamental right not to be arbitrarily deprived of life and the right to an adequate remedy when that right has been violated. A nation's obligations to respect human rights do not stop at its borders but apply anywhere that the nation exercises effective control. The Fifth Circuit's refusal to provide any remedy at all for an unjustified cross-border shooting of an unarmed Mexican national is plainly inconsistent with those obligations.

ARGUMENT

I.
THERE IS NO PRACTICAL REASON TO DENY A REMEDY MERELY BECAUSE THE FATAL SHOT STRUCK SERGIO HERNÁNDEZ ON THE MEXICAN SIDE OF THE BORDER

Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers. The lower courts' decisions in the case have effectively precluded any such redress.

This Court has recognized in the past that U.S. constitutional protections can extend beyond the nation's sovereign territory. Most recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that questions of application of U.S. constitutional rights to persons outside the United States must be answered on the basis of "objective factors and practical concerns, not formalism." *Id.* at 764; *see also id.* at 726-28, 757-63. The *Boumediene* case involved prisoners detained at the U.S. Naval Station at Guantánamo Bay, Cuba, an area under Cuban sovereignty but under the effective control of the United States. The Court accepted that Guantánamo was not part of the territory of the United States. But rather than apply a technical approach based on *de jure* sovereignty, the Court looked to the practical effects of U.S. control at Guantánamo and held that the constitutional right of habeas corpus applied there.

In so holding, this Court distinguished the case from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's search warrant requirement to a search conducted in Mexico by Mexican police at the request of the U.S. Drug Enforcement Administration. The Court noted that applying U.S. constitutional requirements to actions of the Mexican police in cooperation with U.S authorities would raise serious practical difficulties for the ability of the United States to "'functio[n] effectively in the company of sovereign nations.'" *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). In his concurring opinion, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but he agreed with the majority that the circumstances of that case would make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring) (quoted in *Boumediene*, 553 U.S. at 759-60).

Here, by contrast, applying U.S. law would cause no clashes between U.S. and Mexican law. Agent Mesa, unlike the U.S. DEA agents in *Verdugo-Urquidez*, was not acting in cooperation with Mexican law enforcement agencies, nor was he carrying out any operations on Mexican territory. He was operating on U.S. soil as part of his duties under U.S. law, and he was in the United States when he fired the fatal shot. Extending the requirements of the U.S. Constitution to cover the actions of a U.S. officer in the U.S. would not interfere in any way with Mexico's "control over its territory ... and authority

to apply the law there." *Boumediene*, 553 U.S. at 754 (quotation and citation omitted).

According to the Complaint, just prior to the deadly shooting, Sergio Hernández and several other children were playing in the dry, concrete-lined channel of the Rio Grande, which separates El Paso from Ciudad Juárez. Pet. App. 146. The international border invisibly runs down the center line of that concrete channel.[5] The children were repeatedly running up the side of the channel, touching the U.S. border fence (which is on U.S. territory), and then running back down into the channel. Sergio Hernández was apparently on the Mexican side of the border when Agent Mesa shot him. But there would be no practical difficulties involved if the U.S. courts were to apply the same law of excessive force to Agent Mesa's actions, regardless of which side of that invisible line Sergio happened to be on when Agent Mesa's fatal shot struck him.

There is no reason why requiring Agent Mesa to answer for his actions in a U.S. court would require any different considerations than any other excessive-force case heard by the U.S. courts. Applying U.S. constitutional law in such a case does not disrespect Mexico's sovereignty. Any invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy's parents sought to hold Agent Mesa responsible for his actions. Contrary to what the United

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[5] Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., art. 3, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

States has asserted in its Brief in Opposition (at 20-21), a private civil suit arising from the shooting of a Mexican national at the border does not implicate "national security and international diplomacy" when the victim is struck by a bullet on the Mexican side of the border any more than when the lethal impact occurs on the U.S. side of the border. The prior *amicus* briefs submitted by Mexico, like this brief, evidence Mexico's concern that recourse to justice be available to its nationals regardless of where their son happened to be standing when the fatal shot was fired.

When an illegal act is committed in one country and has a direct effect in another country, it is well recognized that *both* countries have jurisdiction to prescribe the applicable law, to punish violations and to adjudicate disputes. *See, e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d (1987); *id.* §§ 421(2)(i)-(j), 431(1). Exercise of jurisdiction by either, therefore, is neither impracticable nor an affront to the sovereign interests of the other. Mexico has a fundamental interest in protecting the rights of its nationals and other persons in its territory, but the United States also has an interest in preventing its own territory from being used to launch assaults on nationals of friendly foreign nations—particularly if those attacks are carried out by a federal officer of the United States in the course of his duties.[6]

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[6] For that reason, Judge Dennis was mistaken when he suggested, in his concurring opinion below, that it would raise "practical and political questions" to apply the U.S. law

(continued)

Indeed, in a similar case, the United States commenced a criminal prosecution against the Border Patrol agent involved,[7] illustrating that United States courts can exercise jurisdiction over cases arising from cross-border shootings. But criminal prosecution in the United States is entirely within the U.S. government's discretion, and it affords no meaningful remedy when, as in every Border Patrol shooting to date except one, the United States declines to prosecute the Border Patrol agent. The Mexican government has sought the extradition of Agent Mesa to Mexico, but the U.S. government denied that request and has not itself prosecuted Agent Mesa. As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts, regardless of any civil or criminal jurisdiction the Mexican courts might have.

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of excessive force to Agent Mesa's actions in this case. *Hernandez v. United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Dennis, J., concurring in part and concurring in the judgment) (Pet. App. 32).

[7] *United States* v. *Swartz*, No. 4:15-cr-1723 (D. Ariz., filed Sept. 23, 2015). In that case, the victim's mother also filed a civil suit, and the U.S. District Court denied the agent's motion to dismiss. *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025 (D. Ariz. 2015), *appeal filed*, No. 15-16410 (9th Cir. July 14, 2015).

II.
THE UNITED STATES HAS UNDERTAKEN AN OBLIGATION TO PROVIDE A REMEDY FOR HUMAN RIGHTS VIOLATIONS TO INDIVIDUALS ON BOTH SIDES OF THE BORDER

Mexico and the United States have recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, is part of the international obligations of every nation. Among other things, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR),[8] which provides in Article 6(1) that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR further provides, in Article 2(3), that individuals whose rights are violated "shall have an effective remedy," including judicial remedies, and that those remedies must be enforced when granted.

Although the United States' obligations under the ICCPR have not been treated as directly enforceable in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court has recognized that decisions interpreting the ICCPR and other international human rights treaties may be persuasive to the extent they shed light on basic human rights principles that are common to those treaties and the U.S. Constitution. *See, e.g., Roper v. Simmons*, 543

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[8] International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty Doc. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

U.S. 551, 575-76 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The international commitments that the United States undertook in Article 6(1) of the ICCPR have obvious parallels in the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In fact, the principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that it regarded existing U.S. constitutional law as being more than sufficient to comply with the ICCPR.[9]

It is well established under the ICCPR and other international human rights treaties that a nation has human rights obligations whenever it exercises "effective control" over an individual, even if such control is exercised outside of its own territory. The claim in this case lies within the scope of the United States' international human rights commitments because the U.S. federal government, through the actions of Agent Mesa, exercised power and effective control over Sergio Hernández.

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[9] The Executive Branch advised the Senate that "the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and laws," except in a few instances in which the U.S. took an explicit reservation against specific ICCPR provisions. Letter of Transmittal from the President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2. Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected gap in the intended U.S. legal framework for compliance with the ICCPR.

In particular, Article 2(1) of the ICCPR requires each party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This provision has been read disjunctively to apply to "all individuals within [the State's] territory" and "all individuals ... subject to [the State's] jurisdiction."[10] In keeping with the intent of the ICCPR to protect individual human rights, "jurisdiction" has been given a flexible reading, turning on the State's effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body charged with interpreting the ICCPR—has observed that:

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[10] *Celiberti de Casariego v. Uruguay*, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981) (Covenant applies to cases of kidnapping by State agents abroad); *Munaf v. Romania*, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009) (State may be liable for violations of the Covenant outside of its area of control, as long as State's activity was "a link in the causal chain that would make possible violations in another jurisdiction"); *Kindler v. Canada*, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993) (State party may be liable under the Covenant for extraditing a person within its jurisdiction or under its control if there is a real risk that the extradited person's rights under the Covenant will be violated in the receiving jurisdiction); Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004).

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

This principle has been applied in a variety of situations in which States have violated the rights of individuals without fully controlling the territory on which those violations occur. For example, the U.N. Human Rights Committee has opined that the alleged secret detention and torture of a trade-union activist in Argentina by Uruguayan security officials would violate the ICCPR. *Lopez Burgos v. Uruguay*, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). The Committee observed that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another

State, which violations it could not perpetrate on its own territory." *Id.* ¶ 12.3.[11]

Under other human rights instruments, a similar principle has been found to apply even in situations where the State has used lethal force without ever obtaining physical custody of the victim. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including *Alejandre v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (Sept. 29, 1999).[12] The *Alejandre* case arose out of the well-known 1996 "Brothers to the Rescue" incident, in which the Cuban Air Force shot down two unarmed civilian airplanes in international airspace between South Florida and Cuba.

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[11] Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied territory under a State's control, even though that territory is not technically part of the State's sovereign territory. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136, ¶¶ 109-111 (July 9, 2004).

[12] *See also, e.g., Aisalla Molina Case (Ecuador v. Colombia)*, Inter-State Petition IP-02, Inter-Am. Comm'n H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, ¶¶ 87-103 (Oct. 21, 2010) (American Convention on Human Rights applied in Ecuador where Colombian armed forces conducted a bombing raid and thereafter "exercised acts of authority over the survivors" in the bombed area).

The Commission found that the facts constituted "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority." *Id.* ¶ 25. The Commission went on to hold that the Cuban Air Force's unjustified use of lethal force violated fundamental principles of human rights, including the right to life as recognized in Article I of the American Declaration of the Rights and Duties of Man.[13] *Id.* ¶ 53.

The European Court of Human Rights has adopted a similar functional approach in cases arising under the European Human Rights Convention.[14] It

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[13] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See, e.g.*, *Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (convention applied to Russia where Russian solider shot and killed a Moldovan citizen even though Russian soldier was not in Russian territory when he fired his weapon); *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶ 91 (May 12, 2005) (convention applied in view of "effective Turkish authority" over individual in custody of Turkish officials in Nairobi, Kenya); *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶¶ 69-80 (May 10, 2001) (convention applied where Turkey exercised "effective control" in the Turkish Republic of Northern Cyprus); *Al-Saadoon v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89 (June 30, 2009) (convention applied in U.K. military prison in Iraq); *Al-Skeini v. United Kingdom*, Eur. Ct. H.R., App. No. 55721/07, ¶¶ 130-150 (July 7, 2011) (convention applied in Iraq where the Coalition Provisional Authority exercised control).

has applied the Convention in several cases where, as here, a State's actions within its territory resulted in injuries to victims outside its territory. For example, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Oct. 27, 2009), a case involving the shooting of a civilian across the Turkish-Cypriot cease-fire line, the European Court of Human Rights held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey" so as to engage Turkey's human rights obligations. *Id.* ¶ 25.[15]

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre*, *Andreou* and the cases involving occupied territory, the killing at issue in this case does not involve military action. Unlike *Lopez Burgos*, it does not involve overseas activities by intelligence or national security agencies. And unlike each of those cases, it does not even involve action outside a country's sovereign territo-

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[15] *See also, e.g., Pad v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52-55 (June 28, 2007) (convention applied where Turkish helicopter shot and killed seven Iranian men near the Turkey-Iran border, even if it was unclear whether the Iranian men had crossed the border into Turkey); *Pisari*, *supra* note 14, ¶ 33 (noting the accepted rule that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities" into its jurisdiction, such that the convention and its obligations apply).

ry—Agent Mesa was standing on U.S. soil when he shot and killed Sergio Hernández. The agent was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government and exercised effective control and authority over the boy through use of deadly force against him. The fact that the boy happened to be on the other side of the invisible line separating the two countries does not change the nature of the agent's actions in the United States or their lethal consequences.

This Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of rights guaranteed by the U.S. Constitution to individuals outside the United States. Here, as in *Boumediene*, practicality and common sense—as well as the United States' international human rights obligations—demonstrate that the U.S. Border Patrol's obligation to refrain from unjustified use of deadly force does not vanish when the victim is located just across the border in the territory of a foreign nation.

CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for proceedings on the merits.

Respectfully submitted,

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December 9, 2016